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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 89

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OF B. B. DERRICK OPPOSING JURISDICTION AND MOTION TO TRANSFER CASE TO UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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Counsel for Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1948

Criminal Action No. 294-48

UNITED STATES OF AMERICA,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT OPPOSING JURISDICTION AND MOTION TO TRANSFER CASE TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Defendant B. B. Derrick files the present statement opposing jurisdiction on the ground that the judgment dismissing the indictment herein was based upon the deficiency of the indictment as a pleading as distinguished from a construction of the statute upon which the indictment is based.

Under the provisions of the Criminal Appeals Act, as amended by the Act of May 9, 1942, 56 Stat. 271, Chapter 295, 18 U. S. C. A. Section 682, Pocket Part, defendant Derrick moves, upon the same ground, that the present appeal be transferred for hearing and determination to the United States Circuit Court of Appeals for the District of Columbia.

Opinion of the District Court

The court below, immediately on the close of argument, rendered an oral opinion reading as follows:

> "The Court: The Motion to Dismiss is in two parts; one, that it is duplicitous and the other that the indictment is bad in substance.
>
> "The court holds that the indictment is not duplicitous.
>
> "As to the second ground, namely, that this indictment does not charge a crime, the court grants the Motion to Dismiss, believing that there has been a failure to set forth sufficient facts.
>
> "In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the Borden case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section III of the Sherman Act, in the view that I take of that act and other acts referred to in argument and judicial precedents presented.
>
> "Mr. Winn: Exception that there are not adequate facts pleaded to make an offense." (R. —)

Argument

Defendants Raised the Question of the Sufficiency of the Indictment as a Pleading:

Defendant Simpson Brothers, Inc. filed a Motion to Dismiss on the ground that the Indictment "does not state facts sufficient to constitute an offense against the United States." (R. —)

Defendant B. B. Derrick moved to dismiss on the ground that the Indictment was bad in substance in that it charged acts by an agricultural cooperative which are immune from

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prosecution under the Clayton Act, the Capper-Volstead Act, the Agricultural Adjustment Act and the decisions of the courts. But, a second ground was set forth as follows:

> "2. And, for such other reasons as are apparent on the face of the indictment herein." (R. —)

This is a familiar method of assailing the sufficiency of the indictment as a pleading and is commonly used for this purpose in the local District Court.

The Transcript of the Oral Argument on the Motion to Dismiss Shows the Indictment Was Assailed as a Pleading:

An inspection of the transcript of the oral argument on the Motion to Dismiss shows that fully as much time was devoted to showing the indictment was bad as a pleading as to the statutory point.

Mr. Leahy, attorney for defendant Derrick, at the outset of his argument on the Motion to Dismiss stated:

> "The motion is broad in its attack. It assails the sufficiency of the indictment to the point where it can no longer remain as a good pleading." (Tr. p. 97)

Pursuant to this, counsel attacked the allegations of paragraph 36, the charging part of the indictment.

As to paragraph 36(a) charging that written contracts were entered into between the distributors and the cooperative, counsel stated these allegations were deficient in the absence of the contracts themselves which should have been made part of the indictment. Counsel said:

> "We have here a request, therefore, that this assertion be deemed sufficiently definite so that the defendants may know with what they are charged, and at the same time that the Court may know and pass upon the claim that it substantially charges an offense to have

been committed by entering into those contracts." (Tr. p. 169)

Counsel later stated:

> ". . . and yet with no information given in this indictment Your Honor is called upon to accept against attack a statement to the effect that that is definite and certain enough to constitute a charge of crime.
>
> "Now, let it not be said it is curable by a bill of particulars. This is a case in which we assail this indictment because of its total overall indefiniteness to charge a crime" (Tr., p. 176-177).

As to the allegations of paragraph 36(b) of the indictment, counsel stated that there was:

> ". . . nothing in all the allegations of the indictment whatsoever to correlate it into an unreasonable restraint of trade. It is alleged that these contracts exist, with no description whatever of methods and means employed to supply the demand; with no illustration or explanation setting forth what the requirements of milk production may be; with no allegation that the milk produced for this area, which I told you this morning has the reputation for being the purest milk sold in the United States; with no allegation that it would enhance the price, . . ." (Tr., p. 179-180).[1]

As to paragraph 36(d), counsel contended that it was an "incomprehensible allegation." (Tr. p. 188) He said:

> "I don't know what it means, prices as low as the prices charged by the association to defendant distributors. I think I will have to pass it up and put the explanation on the other side" (Tr., p. 188).

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[1] The stenographic transcript, although designated almost immediately by defendant Derrick as part of the record herein, was not written up until almost a month after the hearing. It is therefore, garbled and almost unintelligible in spots.

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As to the classification of milk contained in paragraph 36(g), counsel contended that "there is nothing left but conclusions of the pleader" (Tr., p. 199).

As to paragraph 36(j), counsel stated:

> "A mere conclusion, a mere conclusion of the pleader as to what should be the effect of the termination of an order, when the pleader knows as a matter of fact that when that order terminated we were right under the jurisdiction of the State of Virginia as to our price" (Tr., p. 200).

Counsel later stated as to the same paragraph:

> "Now, can there be an allegation whatsoever of wrongdoing laid to our doing a perfectly legitimate act? Never mind the motive. . . . If we do what we have the right to do lawfully we may gain in our own personal interest. That is as sound as a bell, and they can't paint a conspiracy out of it, and there is no way to do it and, furthermore, they do not charge the price did fall.
>
> "They do not say the effect of it would result in a reduction in price. Who knows whether it would, or not?
>
> "Let's not deal in argument. A pleading has no right by way of implication or argumentation as a means to supply direct proof.
>
> • • • • • • •
>
> "So why doesn't this pleader take the law which is open to him and say that thereby they unduly enhanced the price? There is a right way to plead, and there is a way to sneak around a fact that can't be met.
>
> "The Court: Wouldn't that be equally a conclusion, that they were unduly enhanced?
>
> "Mr. Leahy: It would be a conclusion unless the facts were there to establish a basis for it. This is all a conclusion here" (Tr., pp. 201-203).

As to paragraph 36(k) charging that defendants conspired to persuade the Virginia State Milk Marketing Commission to promulgate certain orders, defendant's counsel contended that this simply alleged a "perfectly lawful act which we have a right to do because we still have our right to free speech" (Tr., p. 204). He also stated:

> ". . . there is no charge that they did it unlawfully. There is no charge it was done through misrepresentation. There is no charge that it was done through improper methods. There is no charge that that is all the information that was presented, or that it was erroneous information, and certainly there is a presumption at least that this officially delegated body of the State of Virginia performed its functions intelligently, honestly, and lawfully; and against such a paragraph as that, to say that that act done by us lawfully and legally, and then as they have stated publicly: 'That we do not accuse the Commission of being a co-conspirator,' then there is no allegation of a crime committed, because if the Commissioners were not co-conspirators then there is no imposition upon the Commission, and the presumption then is that the Commission acted in the appropriate, proper and lawful manner, and that what it did was legal" (Tr., pp. 205-206).

As to the allegations in paragraph 36(l) as to persuading the Health Department of the District of Columbia, under the guise of Health Regulations to prevent the importation of milk into the District of Columbia from producers who had not been inspected and licensed, counsel stated:

> "Now, isn't that too bad? Isn't that too bad that we persuaded the District health officials not to introduce into the District of Columbia milk which has not been inspected and licensed by us?" (Tr., p. 207).

He commented once more on the lack of any charge of misrepresentation or refusal to supply information and the

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absence of any direct averment and of a charge by "implication" (Tr., p. 208). Counsel stated:

> "They are not decent enough in the pleading even to assign the reasons for it, and we are entitled to the reasons why we didn't import milk into the District outside of those states, . . ." (Tr., p. 208).

He commented on the absence of any charge of "coercion, boycotting, blacklisting" (Tr., p. 209), and that the absence of these allegations had:

> ". . . stripped this indictment of all its life and vigor because it is by those lawful means lawfully employed for a lawful end that these men did the things for which complaint is made now" (Tr., p. 209).

As to paragraph 36(m) charging defendants discussed and agreed upon prices at which distributors should sell fluid milk, counsel stated:

> "Now, they do not charge us with fixing prices. They do not charge us with fixing unduly enhanced prices. They merely, by way of intendment, by argument and implication, seek to do what they cannot charge even indirectly" (Tr., p. 210).

He likewise commented on the indefiniteness of the indictment (Tr., p. 210) and that the pleader had left the matter of a conspiracy to fix an unduly enhanced price "to intendment, implication and argument" (Tr., p. 211).

As to the allegations of paragraph 36(n) that defendants conspired to remove "existing milk from the market," counsel stated that the allegation means absolutely nothing (Tr., p. 212).

As to the allegations of paragraph 36(o) that the defendants agreed that the existing milk would be removed from

the market even though the distributors would suffer a financial loss in so doing, counsel said:

> "What are we charged with? Are we charged with attempting a monopoly and then taking the excess supply off the market and preventing the other distributors coming in?" (Tr., p. 213).

As to the general allegations in paragraph 36(p) of an agreement to do a variety of acts, counsel said:

> "This is the wastebasket of the indictment, if the Court please. This includes everything in one overall general allegation, pleading deficiencies which have heretofore existed, without specifying details and facts, which it must do, but which it doesn't do, to hold up against the motion to dismiss: . . . (Tr., p. 213).

Counsel also stated, "We want to know the facts with which we are charged . . . give us facts, let us know what the concerns are, let us know whom we have shut off" (Tr., p. 215).

As to the allegation of paragraph 36(p) relative to an agreement to take away contract business from price-cutting, non-contracting distributors, counsel said:

> "What does it mean? They give us no information which we can depend on at all, simply a broad, generally indefinite sort of indictment" (Tr., p. 217).

He also referred to it as:

> "Just a hodge-podge of words pulled out of some indictment."
> "Will Your Honor explain to me what the meaning of 'interfering' is?" (Tr., p. 217)

As to the allegation of paragraph 36(p) relating to forcing price-cutting, non-contracting distributors out of business into bankruptcy, counsel claimed their allegations were unintelligible.

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Summing up, counsel stated that he had attacked the indictment for its substantial deficiencies to charge a crime (Tr., p. 218). As to the acts charged, counsel stated:

> ". . . no facts are alleged here in order to acquaint us with the type or character of the illegality against which we must defend ourselves, and if you take the full supply contract, if you take the classified use market plan, if you take this persuasion of the Virginia and the District health associations out of this it becomes just a jargon of words and a hodge-podge of language with no facts definitely alleged" (Tr., p. 219).

Counsel further stated:

> ". . . I say those men are entitled to a decent indictment, and I say this indictment ought not to be sustained on some slender thread of intendment, implication or argument. . . .
>
> "Then at least we have a right to know, and I say this with all seriousness and all earnestness, we have a right to know by direct allegation of fact what it is we are called upon to defend" (Tr., p. 220).

It is evident from the above quotations that counsel for defendant Derrick, in addition to claiming defendant's acts were immunized by Section 6 of the Clayton Act and the Capper-Volstead Act properly construed, also argued extensively the invalidity of the indictment as a pleading for failure to state sufficient facts. The challenge to the indictment as a pleading was referred to by the Court. After Mr. Skiles, the Government counsel replied, the Court said:

* * * * * * * *

> "THE COURT: . . . May I ask Mr. Skiles if he desires to deal with the indictment itself? Do you desire to deal with whether or not the indictment does properly——
>
> "MR. SKILES (interposing): No, sir, I do not care to go beyond the allegations of the indictment" (Tr., p. 241).

In the reply argument defense counsel once more commented upon the failure of the indictment to set forth the contract with the distributors. He said:

> ". . . that brings up once again the absolute indefiniteness of this indictment because Your Honor does not know what the contract is in this case. That is not a question of proof. That is not in our bill of particulars. That lack of definite statement is only of substantive sufficiency in pleading. Your Honor hasn't this contract before you to determine whether it contains a monopoly or does not contain a monopoly" (Tr., p. 243).

Once more counsel complained that the indictment was "filled with conclusions and argument" (Tr., p. 270) and was "indefinite" and made up of conclusions "without any allegation whatsoever there was any threat, intimidation, or coercion, overcharge or misrepresentation on the part of anyone" (Tr., p. 282).

The Court's Opinion:

The foregoing argument of counsel indicates what was in the mind of the court when it rendered its opinion. The court said that, "as to the second ground, namely that this indictment does not charge a crime, the court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts." This immediately followed the argument of counsel for Defendant Derrick relative to the absence from the indictment of the contracts with the distributors and other failures on the part of the indictment to set forth facts as distinguished from mere conclusions. As an example, there are no facts set forth with reference to the charges contained in paragraph 36(i), (j) and (k) as to a conspiracy between defendants to control the official action of the District of Columbia Health De-

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partment, the Department of Agriculture, and the Virginia Milk Marketing Commission.

The court in its opinion disavowed any intention of holding that the Sherman Act would not, under any circumstances, be applicable to a case involving a cooperative. The court also recognized this Court's holding in *U. S.* v. *Borden*, 308 U. S. 188, and then went on to say:

> "I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented" (Tr., p. 334).

The Applicable Authorities:

The decision below is, at the least, ambiguous and under these circumstances no appeal lies to this Court.

In *U. S.* v. *Wayne Pump Co.*, 317 U. S. 200-204, this Court dismissed the appeal, stating, "The language of the opinion makes it apparent to us that the District Court's conclusion was at least in part bottomed upon the indefiniteness, uncertainty and lack of specificity of the indictments." Also, in *U. S.* v. *Carter*, 231 U. S. 492, this Court refused to attempt to sove the problem as to the ground on which the court ruled by an examination of the entire record. It held that the Criminal Appeals Act precluded review in the absence of a clear showing that the statute applied. In *U. S.* v. *Moist*, 231 U. S. 701, this Court likewise refused to pass on an appeal where it did not appear on what ground the court acted.

As stated in *Robertson & Kirkham's Jurisdiction of the Supreme Court*, Section 169: "Where the grounds of the District Court's decision are ambiguous, doubt will be resolved against applied jurisdiction."

Enough has been said herein to indicate the dubiousness of any contention that the Court dismissed the indictment solely on the statutory point.

The Government Possesses an Easy Remedy:

There is no explanation in the government's Jurisdictional Statement as to why under these circumstances it does not follow the recommendation contained in the concurring opinion of Mr. Justice Jackson in *U. S.* v. *Swift*, 318 U. S. 442, 446, and obtain a certificate from the trial Judge stating clearly on what ground he based his present decision. After stating that the Supreme Court would be greatly aided if the District Court in dismissing an indictment would state a ground upon which the decision was based, Justice Jackson stated: "I am confident that a request from the Government to do so would generally be granted and that to do so would be of assistance to the Government in taking, and to us in passing, on appeals" (at p. 446).

In *Robertson & Kirkham's Jurisdiction of Supreme Court*, Section 169, above referred to, the rule is stated as follows:

> "In order to guard against difficulties of this character, it has become established practice to procure the District Judge to execute a certificate declaring that his judgment was put entirely upon the construction or the invalidity of the statute upon which the indictment was founded and to include such certificate in the transcript of record on appeal."

Citing:

U. S. v. *Chavez*, 290 U. S. 357-59;
U. S. v. *Flores*, 289 U. S. 137-145;
U. S. v. *Hastings*, 296 U. S. 190-191;
U. S. v. *Halsey Stewart Co.*, 296 U. S. 451.

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Motion to Transfer to United States Court of Appeals:

Prior to the amendment of the Criminal Appeals Act by the Act of May 9, 1942, 56 Stat. 271, Chapter 295, 18 U.S.C.A. 682, this Court could only dismiss where the judgment below was based either in whole or in part upon the deficiency of the indictment as a pleading. Now, however, under the provisions of the above-quoted statute, this Court has power to remand the court to the United States Court of Appeals as suggested in *U. S.* v. *Wayne Pump Co.*, 317 U. S. 200, 208-210. This would appear to be the proper disposition of the present appeal.

As the Circuit Court of Appeals has power to decide both the question of the validity of the indictment as a pleading and the statutory question, the government will not in any way lose any of its statutory right of review.

Also, this Court has frequently expressed its reluctance to pass upon important questions of constitutional law or the meaning of statutes, upon a demurrer to an indictment or on a Motion to Dismiss before the full facts have been adduced at the trial. Assuming that the decision below does involve, as contended upon the last page of the government's Jurisdictional Statement, a substantial question as to the extent to which a cooperative may lawfully go in eliminating competition, the case at the present time is in an obviously unsatisfactory state for any final decision by this Court with respect to the legal boundaries within which a farm cooperative may move.

Conclusion

As it appears that the judgment below was at least in part based upon the invalidity of the indictment as a pleading, the present appeal should be remanded in accordance with the provisions of the Act of May 9, 1942, 18 U.S.C.A. 682 (Pocket Part) to the Circuit Court of Appeals for the Dis-

trict of Columbia. Or if the government insists that the judgment below was based solely upon a construction of a federal statute, it should pursue the obvious course of obtaining a certificate to that effect from the trial judge, in accordance with approved practice. Neither this Court nor counsel should be burdened with the difficulty and uncertainty of a procedural question, jurisdictional in character, which can so easily be eliminated from the case.

Respectfully submitted,

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